Lim Kiang Chai v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–21 OF 2009
HISHAMUDIN YUNUS, ABDUL WAHAB PATAIL AND BALIA YUSOF JJCA
12 FEBRUARY 2014

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Evidence — Confession — Voluntariness — Whether murder accused's confession in cautioned statement of his involvement in crime admissible — Whether recording of cautioned statement after long hours of interrogation over five consecutive days rendered it involuntarily made and inadmissible — Whether unsafe to convict murder accused solely on confession in cautioned statement — Whether independent evidence corroborated incriminating part of cautioned statement

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The appellant was convicted and sentenced to death by the High Court after it found him guilty of murdering a lawyer ('the deceased') together with another person still at large. The deceased was shot several times at close range by the pillon rider on a motorcycle as the deceased was reversing his car out of a parking lot. Three eyewitnesses to the shooting, including the deceased's wife who was in the car at the time, were unable to identify the rider or the pillion on the motorcycle as they wore crash helmets with visors or to state the motorcycle's registration number. The only incriminating evidence the prosecution had against the appellant was his cautioned statement in which he allegedly confessed that he was the rider of the motorcycle and that he was hired to murder the deceased. At the trial, the appellant objected to the admission of the cautioned statement arguing that it was not voluntarily made and was untrue and that it was oppressively secured after eleven hours of interrogation per day over five consecutive days. After a trial-within-a-trial, the trial judge ruled the cautioned statement admissible after opining that the appellant was only interrogated for about five to six hours per day. The trial judge also held that there was other independent evidence that corroborated the contents of the cautioned statement. The appellant appealed against both conviction and sentence.

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Held, allowing the appeal and setting aside the conviction and sentence:

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(1) Based on the evidence adduced during the trial-within-a-trial, the prosecution failed to prove beyond reasonable doubt that the cautioned statement was made voluntarily. The lock-up diary showed that every day during the five consecutive days, the appellant was taken from his cell to the interrogation room at around 7am and brought back to his cell

around 5.30pm. The cautioned statement was recorded on the sixth day from 10.05am until 1.30pm. There was no basis to say the interrogation only lasted for five to six hours per day. The continuous long hours of interrogation constituted oppressive conduct on the part of the police. The cautioned statement could not be said to have been made voluntarily and it should not have been admitted by the trial judge (see para 24).

(2) It was unsafe to convict on a murder charge solely based on an accused's confession in a cautioned statement made under s 113 of the Criminal Procedure Code, even if the court ruled the cautioned statement admissible. Prudence and practice required there should be independent corroboration of the incriminating part of the confession (see para 31).

(3) There was no corroborative evidence whatsoever of that part of the cautioned statement directly pertaining to the identity of the rider of the motorcycle. The matters the trial judge identified in the cautioned statement as constituting independent evidence to show the appellant's involvement in the case had no bearing whatsoever to the fatal shooting incident particularly as to the question whether the appellant was the rider of the motorcycle. In other words, there was no corroboration on the incriminating part of the cautioned statement (see paras 37 & 40).

[Bahasa Malaysia summary

Perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi selepas dia didapati bersalah membunuh seorang peguam ('si mati') bersama-sama dengan orang lain yang masih bebas. Si mati ditembak beberapa kali pada jarak dekat oleh pembonceng di atas motosikal sewaktu si mati mengundurkan kereta keluar dari tempat letak kereta. Tiga orang saksi akan kejadian tembakan, termasuk isteri si mati yang berada di dalam kereta pada masa itu, tidak dapat mengenal pasti penunggang atau pembonceng motosikal di atas motosikal kerana mereka memakai *crash-helmets* dengan *visor* atau menyatakan nombor pendaftaran motosikal itu. Satu-satunya keterangan yang menunjukkan kebersalahan yang ada pada pendakwaan terhadap perayu adalah kenyataan amarannya yang mana dia didakwa mengaku bahawa dia adalah penunggang motosikal dan bahawa dia telah diupah untuk membunuh si mati. Semasa perbicaraan, perayu membantah kemasukan kenyataan amaran dengan alasan bahawa ia tidak dibuat secara sukarela dan adalah tidak benar dan bahawa dia telah ditahan secara tindas selepas sebelas jam di soal siasat sehari suntuk selama lima hari berturut-turut. Selepas perbicaraan dalam perbicaraan, hakim perbicaraan memutuskan pernyataan beramaran boleh diterima selepas berpendapat bahawa perayu hanya disoal siasat selama kira-kira lima hingga enam jam sehari. Hakim perbicaraan juga berpendapat

bahawa terdapat bukti sandaran lain yang menyokong kandungan pernyataan beramaran. Perayu merayu terhadap kedua-dua sabitan dan hukuman.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Berdasarkan keterangan yang dikemukakan semasa perbicaraan dalam perbicaraan, pihak pendakwaan gagal membuktikan melampaui keraguan yang munasabah bahawa pernyataan beramaran telah dibuat secara sukarela. Diari lokap menunjukkan bahawa setiap hari dalam tempoh lima hari berturut-turut, perayu telah diambil daripada lokap ke bilik soal siasat pada kira-kira 7 pagi dan dibawa balik ke lokap sekitar jam 5.30 petang. Pernyataan beramaran telah dirakam pada hari yang keenam dari 10.05 sehingga jam 1.30 petang. Tidak ada asas untuk mengatakan soal siasat hanya bertahan selama lima hingga enam jam sehari. Waktu soal siasat yang panjang berterusan merupakan tindakan penindasan oleh pihak polis. Pernyataan beramaran tidak boleh dikatakan dibuat secara sukarela dan ia tidak sepatutnya diterima oleh hakim perbicaraan (lihat perenggan 24).

(2) Ia adalah tidak selamat untuk mensabitkan perayu atas tuduhan pembunuhan semata-mata berdasarkan pengakuan tertuduh dalam pernyataan beramaran yang dibuat di bawah s 113 Kanun Tatacara Jenayah, walaupun mahkamah memutuskan penyataan amaran diterima. Hemat dan amalan diperlukan adalah keterangan sandaran yang menunjukkan kebersalahan kepada pengakuan (lihat perenggan 31).

(3) Tidak ada sebarang keterangan sokongan pada bahagian pernyataan beramaran secara terus menjurus kepada identiti penunggang motosikal. Perkara-perkara yang dikenalpasti oleh hakim perbicaraan dalam pernyataan beramaran sebagai menjadi keterangan sandaran untuk menunjukkan penglibatan perayu dalam kes ini tidak berkaitan langsung kepada kejadian tembakan yang menyebabkan kematian terutamanya untuk soalan sama ada perayu adalah penunggang motosikal. Dalam erti kata lain, tiada keterangan yang menyokong menunjukkan kebersalahan kepada pernyataan beramaran (lihat perenggan 37 & 40).]

Notes

For cases on voluntariness, see 7 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1020–1054.

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Juraimi bin Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] 1 MLJ 537, CA (refd)

PP v Lai Pong Yuen & Ors [1968] 1 MLJ 12 (refd)

Legislation referred to

Criminal Procedure Code s 113

Appeal from: Criminal Trial No 45–05 of 2005-1 (High Court, Kuching)

Kitson Foong (Gladys Lee Lee Yen with him) (Kit & Associates) for the appellant.
Noor Fadzila bt Ishak (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal by the appellant, Lim Kiang Chai ('the accused'), is against his conviction and death sentence by the High Court of Kuching for the murder of one Fabian Lim Ann Hoaw ('the deceased').

[2] The murder took place on 18 February 2005 at about 6.15pm just after the deceased and his wife had finished having a meal at the Fu Xiang Food Centre, Rubber Road, Satok, Kuching.

[3] The deceased was a lawyer practising in Kuching.

[4] The appellant is alleged to have committed the crime with another person still at large.

[5] He was arrested in Sibu on 2 March 2005 and brought to Kuching for his trial. He was convicted for murder and sentenced to death by the High Court of Kuching on 26 December 2008.

[6] At the trial, the appellant denies the charge.

[7] The case for the prosecution is that at the material time the deceased and his wife had just finished their meal at the Fu Xiang Food Centre, and had got into their car. As the deceased was reversing his car out of the parking lot, two persons came in a motorcycle and stopped behind the deceased's car. The pillion rider got off the motorcycle, approached the deceased's car, and with a pistol fired four shots at the deceased at close range. The deceased, who was wounded, was immediately rushed to the Kuching General Hospital. But he died of the gunshot wounds upon arrival at the emergency unit of the hospital.

[8] The appellant is alleged to have been the driver of the motorcycle.

[9] That the deceased was murdered at the stated place, date and time is not disputed. The issue is: was the appellant the driver of the motorcycle that was used by the gunman, the pillion rider?

[10] Three persons testified that they were at the scene of the crime at the material time and that they saw the shooting. They are: A

(a) one Capt Mohd Faisal bin Zakaria (PW10);

(b) one Poo Siang Hin (PW13); and B

(c) Mdm Chin Siew Chin (PW16), the wife of the deceased.

[11] At the time of the shooting, PW10 was in his friend's shop at Jalan Rubber. Hearing gunshots, he immediately looked towards the direction of the gunshots and saw the deceased being shot. He saw the two persons on a motorcycle about to drive away from the scene. He helped to drive the injured deceased and PW16 ('the deceased's wife') to the hospital, using the deceased's car. C

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[12] PW13, who owns a stall near the entrance of Fu Xiang Food Centre, was at his stall at the material time. He heard the gunshots and he saw a man wearing a crash helmet with a visor standing beside the deceased's car and shooting several times at the deceased.

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[13] PW16 was in the car at the time her husband ('the deceased') was shot. She was at the front seat sitting next to her husband, who was reversing the car.

[14] However, none of the witnesses (PW10, PW13 or PW16) who witnessed the shooting was able to name or describe the identity of the two riders of the motorcycle as both of them were wearing crash helmets with visors; nor were they able to state the registration number of the motorcycle used by the assailants. F

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[15] At the trial at the High Court, the prosecution relied on a cautioned statement (exh P114) made by the appellant (made pursuant to s 113 of the Criminal Procedure Code) as a crucial piece of evidence to implicate the appellant in the murder of the deceased. It is the contention of the prosecution that the appellant in his cautioned statement had confessed to being hired to murder of the deceased, and that he was the driver of the motorcycle that carried the gunman who shot the deceased on the day of the brutal killing. H

[16] The appellant, at the trial, had objected to the tendering of the cautioned statement by the prosecution on the ground that it was not voluntarily made by him by reason of oppression, and that all that is stated in the cautioned statement is not true. I

[17] After a trial-within-a-trial, the learned trial judge ruled that the cautioned statement was voluntarily made by the appellant and thus admissible as evidence.

[18] In his cautioned statement, the appellant is alleged to have confessed to being the driver of the motorcycle, a stolen Yamaha 100, used to commit the crime. According to the cautioned statement, the appellant was hired by his boyhood friend, one Roger Wong, to kill the deceased; and for which he was paid RM65,000. According to the cautioned statement, the gunman who rode as a pillion rider on the motorcycle was one Ah Bee; and that Ah Bee was recruited by a friend of Roger Wong called Ah Ho.

[19] We allowed this appeal; and we set aside the conviction and sentence.

[20] The following are our reasons.

[21] In the present case, the prosecution relied primarily (if not entirely) on the cautioned statement of the appellant in order to prove its case against the appellant. And the learned trial judge, in his grounds of judgment, sets out in its entirety the contents of the cautioned statement; and, based on the cautioned statement, had made a finding that the appellant was the driver of the motorcycle at the time of the shooting.

[22] It is settled law that the legal burden of establishing the voluntariness of a cautioned statement lies on the prosecution; and the standard of proof is that of beyond reasonable doubt.

[23] It is equally trite law that the only burden that rests upon an accused is to place before the judge such facts as would raise a well-grounded suspicion that the cautioned statement was made involuntarily (per Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Court of Appeal in *Juraimi bin Husin v Public Prosecutor; Mohd Affandi bin Abdul Rahman & Anor v Public Prosecutor* [1998] 1 MLJ 537 at p 562).

[24] In our judgment, based on the evidence adduced during the trial-within-a-trial, the prosecution had failed to prove beyond reasonable doubt that the cautioned statement was made by the appellant voluntarily. We note from the evidence that the appellant was subjected to long hours of interrogation for five consecutive days from 3 March 2005 until 7 March 2005. The length of interrogation was about 10 and a half hours each day (of course, we make allowance for lunch breaks and toilet breaks in between). The lock-up diary shows that everyday (during the said five consecutive days) the appellant

would be taken out from his cell to the interrogation room for interrogation early in the morning at around 7am; and he would be brought back to his cell late in the evening around 5.30pm.

[25] After the intensive long hours of interrogation for a period of five consecutive days, the cautioned statement was recorded on 8 March 2005 from 10.05am until 1.30pm. It was recorded by one Chief Insp Ang Seow Aun (TWT PW1).

[26] Before the learned trial judge, it was contended by the appellant that the interrogation of the appellant while he was in custody for long hours and for five consecutive days was an act of oppression on the part of the police, thus rendering the cautioned statement not voluntarily made and inadmissible. But this argument was rejected by the learned trial judge. He held:

> With regard to the accused's allegation that he was interrogated for long periods of at least 11 hours a day, I find this difficult to believe because the evidence shows, especially from the lock-up sentry assigned to escort him during that period, TWT PW[13], that the accused was served and had a lunch break daily and was also allowed to go to the toilet on request. In view of this I am more inclined to believe TWT PW12 Sgt Maj Khor that the accused's interrogation lasted for 5 to 6 hours per day.

[27] With respect, we disagree with the finding of the learned trial judge. On the evidence, Sgt Maj Khor (TWT PW12) could not have been telling the truth. It is to be recalled that according to the lock-up diary the interrogation began around 7am and ended at around 5.30pm The police sentry, TWT PW13, did not elaborate to explain that for each day, how long was the lunch break; and how long were the toilet breaks? Therefore, what is the basis for Sgt Maj Khor to say that the interrogation only lasted for 5 – 6 hours per day. In our judgment, the continuous long hours of interrogation of the appellant by the police officers in question for a period of five consecutive days, constitute oppressive conduct on the part of the police officers involved in the interrogation. Thus, the cautioned statement cannot be said to have been voluntarily made by the appellant. The cautioned statement, therefore,should not have been admitted by the learned trial judge. As the prosecution relies primarily (if not entirely) on the cautioned statement, it follows that once the cautioned statement is ruled inadmissible, then the conviction is no longer sustainable.

[28] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 Abdoolcader FJ said (at p 272):

> No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement (*Ibrahim v R* [1914] AC 599 per Lord Sumner) and this test was accepted by the House of Lords as the correct approach in Director of *Public Prosecutions v Ping Ling* [1975] 3 All ER 175 …

[29] In *Juraimi bin Husin v Public Prosecutor* Gopal Sri Ram JCA said (at p 563):

> A statement recorded under the provisions of s113 of the CPC may also be held to be inadmissible if it was obtained through oppression as defined by Sachs J in *R v Priestly* (1965) 51 Cr App Rep 1.

[30] However, there is another reason as to why the appeal must be allowed. In our judgment, it is unsafe to convict a person, particularly on a murder charge, which carries the death penalty, solely on his confession made in a cautioned statement to a police officer under s 113 of the Criminal Procedure Code — even if the court were to rule the cautioned statement admissible.

[31] In *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12 Ismail Khan J (as he then was) ruled (at p 14):

> Unlike the confession of a co-accused, a confession by an accused can be used against himself, and if believed could lead to a conviction. But the rule of prudence requires that there should be independent corroboration.

[32] In *Juraimi bin Husin v Public Prosecutor* Gopal Sri Ram JCA said (at p 563):

> Lastly, we accept as settled law that once a confession is admitted in evidence an accused may be convicted solely on its strength. However, as a matter of prudence and practice, the court ought to look for corroboration of the incriminating part of the confession. See *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12; *Public Prosecutor v Chong Boo See* [1988] 3 MLJ 292; *Hasibullah bin Mohd Ghazali v Public Prosecutor* [1993] 3 MLJ 321.

[33] On our part, we propose to adopt the rule of prudence as laid down in these cases.

[34] Thus, we ask ourselves: are there any independent corroboration of the cautioned statement regarding the role of the appellant in the fatal shooting of the deceased as being the driver of the motorcycle in question?

[35] The learned trial judge, in his grounds of judgment, held there are independent corroborative evidence in respect of at least *three matters* stated in

the cautioned statement which show *the appellant was involved in the case* (to borrow the words of the learned trial judge). This is what the learned trial judge said:

> Now, despite the accused's claim that everything in the cautioned statement is untrue and made up by the police and that he was not involved in any way with this case, I find that there is independent corroboration in respect of at least three matters stated in the cautioned statement which show the accused was involved in the case. Sim Eng Huat had testified that he was in the gold coloured Proton Wira when it was stopped by the police. In his cautioned statement the accused had referred to the fact that the gold coloured Proton Wira car driven by 'Ah Huat' and 'Siaw Fei' was stopped and they were detained. There is no evidence before the Court which police officers who interrogated the accused knew about 'Ah Huat' and 'Siaw Fei' being so stopped to put that information into his cautioned statement as alleged.
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> The accused had also mentioned that two or three days after he had showed Ah Huat and Ah Bee where the deceased's offices were located, Ah Bee showed him (the accused) a cheque for RM1m belonging to the deceased's law firm which the accused said he tore up as it was useless since it was made out under a company name. The evidence led in the prosecution case shows that a cheque for RM1m in respect of a land transaction was stolen from the deceased's office when the office was burgled on 21 January 2005. There is no evidence before the Court which police officers who interrogated the accused knew about this cheque for RM1 million being stolen so as to put that information into his cautioned statement as alleged.
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> It is also in evidence that two black brief cases which were used by the deceased and his partner were stolen during the burglary. The evidence shows that the police recovered a black brief case (Exh P 110) from the accused's house. Mr Lim Heng Choo (PW20) the partner of the deceased confirmed in his evidence that the black bag recovered from the accused's house was the black brief case used by him. He was able to identify the brief case from two features: (a) the combination numbers of the two locks. He had set them to his date of birth ie '219' for 21st September. The brief case recovered from the accused's house which PW20 examined in Court had the combination number of the left lock changed but the right hand lock was still '219', which was the combination number he had left the lock set to on the date it was stolen; (b) after he purchased the brief case he had used it for a trip to Bintulu when the brief case travelled as checked-in luggage. When he retrieved the brief case in Bintulu he noticed a distinctive scratch mark on the back of the brief case which was not there before. PW20 pointed out in Court a curved shaped scratch mark on the brief case which was recovered from the accused's house. I accept Mr Lim's evidence on the point. His evidence is not inherently improbable and is consistent with the fact that a burglary had taken place at his office when the brief case was stolen. This evidence about the stolen brief case must be viewed against the fact that in his cautioned statement the accused had said that Ah Bee had produced to the accused other items stolen from the deceased's office.
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> In my judgment the above evidence provide independent corroboration of the accused's involvement in this case despite his denial and that what was stated in his cautioned statement was not all made up by the police as alleged. For this reason, I find that the accused's cautioned statement should be given the weight it deserves and not excluded from the evidence as contented by the defence.

[36] With respect, we are unable to agree with the approach adopted by the learned trial judge.

[37] Having carefully examined the evidence, we are of the view that there is no corroborative evidence whatsoever of that part of the cautioned statement directly pertaining to the identity of the driver of the motorcycle.

[38] We note that there are no eyewitnesses who could identify the riders of the motorcycle as they were wearing crash helmets with the visors down. This is acknowledged by the learned trial judge when he said:

> Now that the accused has denounced everything stated in his cautioned statement as untrue for the reasons given by him, I must consider what weight to attach to it in the light of the attack mounted by the accused against it. In doing so I am acutely aware of the fact that that whilst there are eye witness account of the deceased's shooting to death, there is no eyewitness account of the identity of the gunman and the driver of the motorcycle as they wore crash helmets with the visor down. The only evidence of their identity comes from the accused's cautioned statement.

[39] Thus there is here a finding of fact by the learned trial judge that the only evidence on the identity of the killers comes from the cautioned statement of the appellant. There is no cross-appeal by the prosecution on this finding of fact by the learned trial judge on the absence of evidence (apart from the cautioned statement) on the identity of the killers.

[40] In our judgment, and with respect to the learned trial judge, the three matters' in the cautioned statement, namely:

(a) the narration about the gold coloured Proton Wira car;

(b) the narration about the RM1m cheque; and

(c) the narration about the black brief case,

that the learned trial judge referred to, and said to have been corroborated by independence evidence, have no bearing whatsoever on the fatal shooting incident, particularly, on the question: was the appellant the driver of the motorcycle used by the gunman who shot the deceased? In other words, there is no corroboration on the incriminating part of the cautioned statement.

Appeal allowed and conviction and sentence set aside.

Reported by Ashok Kumar